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THE USE OF LIS PENDENS IN ACTIONS ALLEGING CONSTRUCTIVE TRUSTS OR EQUITABLE LIENS: DUE PROCESS CONSIDERATIONS

I. INTRODUCTION

The lis pendens statute¹ in California has been subjected to much criticism by commentators. Once filed, a lis pendens gives constructive notice of pending litigation affecting the title to, or possession, of real property. It ensures the recording party priority in the property for any judgment secured in the action over any other property interest acquired subsequent to its filing.²

A lis pendens creates a cloud on title,³ rendering the property virtually unmarketable. Consequently, its pervasive effect lends a plaintiff considerable leverage in any lawsuit. The requirements for filing are simple—the recording party need only have a claim purporting to affect the title to, or possession of, real property.⁴ While it serves a proper function, the ease with which a lis pendens can be filed contributes to its abuse. Thus, most judicial decisions construing the statute are concerned with its application rather than its purpose.⁵

Recently, in *Coppinger v. Superior Court*,⁶ the Fourth District Court of Appeal held that an action to impose a constructive trust on real property was an action “affecting title to or possession of real property” and therefore within the purview of the lis pendens stat-

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1. CAL. CIV. PROC. CODE § 409 (Deering 1972 & Supp. 1983) provides in pertinent part:

In an action concerning real property or affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint . . . may record . . . a notice of the pendency of the action From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action as it relates to the real property

2. CALIFORNIA CONTINUING EDUCATION OF THE BAR, REVIEW OF 1968 CODE LEGISLATION 60 (1968) [hereinafter cited as CEB].

3. *Id.*

4. See CAL. CIV. PROC. CODE § 409 (Deering 1972 & Supp. 1983).

5. Comment, *Abuses of the California Lis Pendens: An Appeal for Legislative Remedy*, 39 S. CAL. L. REV. 108, 110-11 (1956). See also *Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 405 (1966); *Allied E. Fin. v. Goheen Enter.*, 265 Cal. App. 2d 131, 71 Cal. Rptr. 126 (1968).

6. 134 Cal. App. 3d 883, 185 Cal. Rptr. 24 (1982).

ute.⁷ The equitable remedy of a constructive trust, however, may be used as a device to secure a claim seeking money damages⁸ regardless of whether the underlying claim concerns particular real property, and thus may be an abuse of the lis pendens statute.

Consequently, *Coppinger* raises questions concerning the uniqueness and necessity of the subject property to satisfy a particular plaintiff's claims. The lis pendens procedure may not fairly accommodate the competing interests of the plaintiff, defendant and state in the property. The less unique the real property is to a plaintiff, or necessary to effective resolution of the underlying claim, the more questionable the use of the lis pendens procedure.

This comment reviews the purpose and procedure of the lis pendens statute and critically analyzes *Coppinger v. Superior Court*.⁹ Additionally, the comment explores the constitutional implications of the use of a lis pendens in actions seeking to impose the equitable remedies of constructive trusts and equitable liens, and suggests alternatives to the present lis pendens procedure which would better accommodate the competing interests in the property.

II. LIS PENDENS

A. Purpose

Generally, a person who is not a party to an action is not bound by its judgment. The exception to that common law rule was the pendente lite¹⁰ purchaser of real property. "The mere existence of litigation affecting real property was said to impart constructive notice to all the world that any purchasers, pendente lite, would take the property subject to the outcome of the action."¹¹ California's lis pendens statute, Code of Civil Procedure section 409, was enacted to ameliorate the harshness of the common law rule.¹²

7. *Id.* at 891, 185 Cal. Rptr. at 29.

8. A lis pendens will not, however, support a claim for money damages alone. *Allied E. Fin. v. Goheen Enter.*, 265 Cal. App. 2d 131, 71 Cal. Rptr. 126 (1968). *See also* *Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 405 (1956); *Parker v. Superior Court*, 9 Cal. App. 3d 397, 88 Cal. Rptr. 352 (1970).

9. 134 Cal. App. 3d 883, 185 Cal. Rptr. 24 (1982).

10. "Pending the suit, during actual progress of a suit; during litigation." *BLACK'S LAW DICTIONARY* 1020 (rev. 5th ed. 1979).

11. Comment, *supra* note 5, at 109.

12. The 1872 enactment altered the common law exception and provided that upon the litigant's failure to file a lis pendens, a bona fide purchaser was not bound by any judgment subsequently rendered. "We consider our statute, not as giving new rights to the plaintiff, but as a limitation upon the rights which he had before. If no lis pendens be filed, the party acquiring an interest or claim *pendente lite* stands wholly unaffected by the suit." *Richardson*

The lis pendens doctrine was judicially developed in an effort to retain control of property subject to litigation.¹³ The doctrine is illustrative of the universal presumption that real property is unique, and that its loss is not compensable in money damages.¹⁴

Once recorded, a lis pendens gives constructive notice of pending litigation affecting real property.¹⁵ The party recording the lis pendens gains priority over any interest acquired in the property subsequent to filing.¹⁶

Few judicial decisions construe the "essence or purpose" of the lis pendens statute; most focus on its application.¹⁷ California case law adheres to the theory that the lis pendens was designed primarily to give notice to third parties and not to aid plaintiffs in pursuing their claims.¹⁸ Most authorities, however, recognize that its use promotes the efficient administration of justice.¹⁹ In this sense, its use parallels that of pre-judgment attachment remedies.²⁰ Regardless of the theory subscribed to, the practical effect of a lis pendens is to preserve the status quo between the parties during litigation. Otherwise, litigation would be meaningless because judgments could be defeated by the transfer of property pendente lite.²¹

B. Procedure

The only condition for filing a lis pendens is that the underlying

v. White, 18 Cal. 102, 107 (1861). See also *Ault v. Gassaway*, 18 Cal. 205 (1861).

13. Comment, *supra* note 5, at 109.

14. Cf. *Porporato v. Devincenzi*, 261 Cal. App. 2d 670, 68 Cal. Rptr. 210 (1968) (party seeking specific performance of a land sale contract can rely on historic presumption that land is unique and need not prove inadequacy of money damages to compensate for breach).

15. The notice must contain the names of the parties, the object of the action or cross action, and a description of the affected property. CAL. CIV. PROC. CODE §409 (Deering 1972 & Supp. 1983).

16. The recording party gains priority in the property itself, for any judgment secured in the action. See, CEB, *supra* note 2.

17. See *supra* note 5.

18. See, e.g., *Allied E. Fin. v. Goheen Enter.*, 265 Cal. App. 2d at 131, 71 Cal. Rptr. at 127 (1968).

19. E.g., Comment, *Does California's Statutory Lis Pendens Violate Procedural Due Process?*, 6 PAC. L.J. 62, 76 (1975).

20. See *Howden-Goetzl v. Superior Court*, 7 Cal. App. 3d 135, 138, 86 Cal. Rptr. 323, 326 (1970).

21. "The creditor's need for security is great, particularly when the dispute involves land. An action for specific performance for the sale of real property by one claiming ownership would be of little importance if a bona fide purchaser for value and without notice of the pending action acquired the property during the pendency of the law suit." Note, *Lis Pendens and Procedural Due Process*, 1 PEPPERDINE L. REV. 433, 440 (1974). Cf. CAL. CIV. CODE § 3387 (Deering 1972) (presumption that money damages are not adequate compensation for breach of agreement to transfer real property).

ing cause of action must affect title to or possession of real property.²² Once filed, its effect continues until a final judgment is rendered and time for appeal has expired in the underlying cause of action, or, until the case is settled or dismissed.²³ One California court observed that "[t]he oppressive quality of a notice of any lis pendens is obvious. A plaintiff may make a parcel of real property unmarketable for a period of two to five years, or more, while a civil action works its way through the courts."²⁴ It was this "oppressive quality" that often coerced property owners faced with a lis pendens to settle claims in excess of their true worth.²⁵ Therefore, a lis pendens is an aggressive weapon in any litigation. The relatively easy filing requirements promote abuse of the statute.²⁶ The lis pendens expungement process, enacted in 1968, was designed to curb such abuse.²⁷ Any party to the action can move to expunge the lis pendens under either of two procedures.²⁸ Under section 409.1,²⁹ the

22. Although the statute also states that a lis pendens may be filed "[i]n an action concerning real property," that phrase was added in 1959 to conform to federal legislative requirements. It was not intended to broaden the class of actions to which the statute was applicable. 34 CAL. ST. B.J. 629 (1959). See also *Allied E. Fin. v. Goheen Enter.*, 265 Cal. App. 2d 131, 71 Cal. Rptr. 126 (1968); *Kendall-Brief v. Superior Court*, 60 Cal. App. 3d 462, 131 Cal. Rptr. 515 (1976).

23. CALIFORNIA REAL ESTATE LAW AND PRACTICE § 121:33 (Mathew Bender ed. 1982). "Once the lis pendens was recorded, regardless of the merits of the action that gave rise to it, the landowner found it difficult to obtain either prospective purchasers or reputable lending institutions willing to deal with the property." CEB, *supra* note 2, at 60 (citing *Metropolitan News (Los Angeles)* Sept. 14, 1965, at 1). See *Allied E. Fin. v. Goheen Enter.*, 265 Cal. App. 2d at 134, 71 Cal. Rptr. at 127, 128 (recognizing that a lis pendens restricts the property's marketability).

24. *Nash v. Superior Court*, 86 Cal. App. 3d 690, 700, 150 Cal. Rptr. 394, 400 (1978).

25. Alexander, *Lis Pendens Reform by Land Attachment*, 43 L.A. BAR BULL. 419 (1968).

26. CEB, *supra* note 2, at 60. "Earlier proposals requiring the party noticing the lis pendens to post a bond had been rejected by the legislature." *Howden-Goetzl v. Superior Court*, 7 Cal. App. 3d at 138 n.1, 86 Cal. Rptr. at 324 n.1 (citing State Bar 1966 Conference Resolutions 8 and 17, 42 STATE BAR J. 200-202 (1967); State Bar 1967 Resolution 1, 43 STATE BAR J. 314 (1968); S.B. 1458, California Legislature, 1967 Regular Sess. (amending CAL. CIV. CODE § 490)).

27. CEB, *supra* note 2, at 60.

28. CAL. CIV. PROC. CODE §§ 409.1, 409.2 (Deering 1972 & Supp. 1983). Even if the notice is expunged, a purchaser may still take the property subject to any judgment rendered if the purchaser had actual notice of the litigation, apart from a normal title search.

29. CAL. CIV. PROC. CODE § 409.1 (Deering 1972 & Supp. 1983) provides in pertinent part:

At any time after pendency of an action has been recorded . . . the court . . . shall, upon motion of a party to the action . . . order that the notice be expunged, unless the party filing the notice shows to the satisfaction of the court, by a preponderance of the evidence, that:

(a) The action does affect title to or right of possession of the real property

notice will be expunged upon a motion unless the recording party shows the court by a "preponderance of the evidence" that the underlying action affects the title or possession of the real property described in the notice and was filed in good faith.³⁰ Alternatively, expungement under section 409.2³¹ does not place in issue the right to record a lis pendens. Instead, it provides that a court may expunge the lis pendens if it finds that adequate relief can be secured for the recording party by the moving party's posting of security.³²

The expungement procedures have been criticized for their summary treatment of the merits of the underlying claim.³³ In *Malcolm v. Superior Court*,³⁴ the California Supreme Court held that the expungement process was not a "minitrial" on the merits of the underlying case.³⁵ Thus, courts are severely restricted and may not

described in the notice; and

(b) Insofar as the action affects title to or the right of possession of the real property described in the notice, the party recording the notice has commenced or prosecuted the action for proper purpose and in good faith.

30. Whether the party noticing the lis pendens "commenced or prosecuted the action for a proper purpose and in good faith" is measured subjectively. "Not in good faith" means that the person initiating the action does not believe in its validity. CAL. CIV. PROC. CODE § 409.1 (Deering 1972 & Supp. 1983). "Improper purpose" means that the action was begun out of hostility or for the purpose of forcing a settlement. *United Professional Planning v. Superior Court* 9 Cal. App. 3d 377, 388, 88 Cal. Rptr. 551, 557 (1970) (citing *Albertson v. Raboff*, 46 Cal. 2d 375, 383, 295 P.2d 405, 410 (1956)). See also *Brownlee v. Vang*, 206 Cal. App. 2d 814, 24 Cal. Rptr. 158 (1962) (notice expunged because court could not determine if property described in notice was same as described in complaint).

31. CAL. CIV. PROC. CODE § 409.2 (Deering 1972 & Supp. 1983) provides in pertinent part:

At any time after notice of pendency of an action has been recorded . . . the court . . . may order that the notice be expunged if the moving party shall have given an undertaking of such nature, in such amount and within such time as shall be fixed by the court after notice and hearing, such undertaking to be to the effect that the moving party will indemnify the party recording the notice for all damages which he may incur if the notice is expunged and the moving party does not prevail and if the court finds that adequate relief can be secured to the party recording the notice by the giving of such undertaking.

32. Section 409.2 motions present two issues: (1) whether adequate relief can be secured by posting an undertaking; and, (2) what amount constitutes an adequate undertaking. *Trapasso v. Superior Court*, 73 Cal. App. 3d 561, 570, 140 Cal. Rptr. 820, 825 (1977). See also *Stewart Dev. Co. v. Superior Court*, 108 Cal. App. 3d 266, 166 Cal. Rptr. 450 (1980).

33. E.g., Comment, *supra* note 5.

34. 29 Cal. 3d 518, 629 P.2d 495, 174 Cal. Rptr. 694 (1981).

35. *Id.* at 527, 629 P.2d at 499, 174 Cal. Rptr. at 698. *Malcolm* concerned an alleged oral contract to sell the real property in question. The court, in construing the expungement procedure under § 409.1, stated:

There is nothing in the language of the statute to suggest that the legislature intended to require a plaintiff to demonstrate the likelihood of its success at trial in order to avoid the expungement of a lis pendens; likewise, there is nothing in the language of the statute to indicate that the legislature intended to transform

consider what merits lie behind the recording of a *lis pendens*.³⁶ A court may look to the merits only upon the introduction of independent evidence of bad faith or improper purpose,³⁷ but again, its inquiry is limited; the merits may only be considered to measure the integrity of the submitted evidence.³⁸

III. COPPINGER V. SUPERIOR COURT

Diana and Donald Coppinger (defendants) were the owners of a home sold to Diane McKay (plaintiff). In June, 1980, defendants discovered termites coming through a crack in the foundation of their residence and had them exterminated. Plaintiff subsequently bought defendants' home in July, 1980, and took possession in September. In February 1981, plaintiff noticed termites³⁹ and in December brought an action against the defendants alleging fraud in the inducement of the residential sales contract.⁴⁰ Plaintiff pleaded in the alternative, requesting either compensatory and punitive damages against defendants, or rescission of the sale and the imposition of a constructive trust on defendants' new property. The day after filing the complaint, plaintiff filed a *lis pendens* on defendants' new home. Defendants moved to expunge the notice. The trial court denied the motion and defendants appealed.⁴¹

On appeal, the court rejected defendants' contention that plaintiff was required to produce evidence that the action affected title to or possession of real property and was commenced for a proper purpose and in good faith. The court stated that plaintiff could rely on

the pretrial expungement procedure into any type of minitrial on the merits of the case.

Id. at 526-27, 629 P.2d at 499, 174 Cal. Rptr. at 698. *Accord* Peery v. Superior Court, 29 Cal. 3d 837, 633 P.2d 198, 176 Cal. Rptr. 533 (1981) (only in post-judgment context may a court consider merits in light of trial court's findings and judgment).

36. The *Malcolm* court stated that the critical inquiry was whether the recording party commenced the action in "good faith" and for a "proper purpose." 29 Cal. 3d at 523, 629 P.2d at 497, 174 Cal. Rptr. at 696.

37. *United Professional Planning v. Superior Court*, 9 Cal. App. 3d at 385, 88 Cal. Rptr. at 555.

38. *Malcolm v. Superior Court*, 29 Cal. 3d at 529, 629 P.2d at 501, 174 Cal. Rptr. at 700.

39. An inspection revealed more termites coming from additional cracks in the foundation of the house. *Coppinger v. Superior Court*, 134 Cal. App. 3d at 886, 185 Cal. Rptr. at 26.

40. Plaintiff brought an action against Warmington Development, Inc., who constructed the home, in four counts for negligence, breach of implied warranty, strict liability, and nuisance. A fifth count named the Coppingers for misrepresenting the nature and extent of the termite problem and the likelihood that it would recur. *Id.* at 887, 185 Cal. Rptr. at 27.

41. *Id.* at 887, 185 Cal. Rptr. at 27.

her verified complaint to discharge her burden of proof.⁴² Relying on *Malcolm*, the court reasoned, "we do not believe that a defendant may rebut the plaintiff's showing simply by presenting counter affidavits which controvert the plaintiff's evidence and raise triable issues of fact on the merits of the case."⁴³ The court concluded that defendants' failure to produce independent evidence of bad faith or improper purpose precluded expungement under section 409.1.⁴⁴

Citing *Brownlee v. Vang*,⁴⁵ defendants further contended that an action to impose a constructive trust on real property was not an action affecting the title or possession of real property.⁴⁶ The court rejected defendants' reliance on *Brownlee* and reasoned that "the basis of the [*Brownlee*] decision was the failure to describe the property in the complaint, so that it was impossible to determine whether the complaint and the notice of lis pendens referred to the same property."⁴⁷

The *Coppinger* court expunged the lis pendens under section 409.2.⁴⁸ It found that defendants' posting of an undertaking would adequately secure the relief requested by plaintiff since her interest in the property was purely monetary.⁴⁹

Essentially, plaintiff in *Coppinger* was concerned with the ability to recover a money judgment. A lis pendens, however, will not support an action for money damages alone.⁵⁰ Because plaintiff could plead in the alternative and was not required to make an election of remedies,⁵¹ she arguably gained unwarranted leverage through the use of a lis pendens. In other words, plaintiff gained rights in defendants' new property without having to show any enti-

42. *Id.*

43. *Id.* at 888, 185 Cal. Rptr. at 27-28.

44. *Id.* at 890, 185 Cal. Rptr. at 28-29.

45. 206 Cal. App. 2d 814, 24 Cal. Rptr. 158 (1962).

46. *Coppinger v. Superior Court*, 134 Cal. App. 3d at 890, 185 Cal. Rptr. at 29. Defendants also argued that any judgment secured in the underlying suit would be their own personal liability and not affect the title or possession of their property. Petitioner's Notice of Motion to Expunge Lis Pendens Notice From Record at 7. *Id.* at 883, 185 Cal. Rptr. at 24.

47. *Id.* at 890-91, 185 Cal. Rptr. at 29. The court also cited *Marshall v. Marshall*, 232 Cal. App. 2d 232, 42 Cal. Rptr. 686 (1965) standing for the proposition that an action to impress a constructive trust is an action for the recovery of real property within Code of Civil Procedure section 318 (prescribing a five-year statute of limitation).

48. 134 Cal. App. 3d at 892, 185 Cal. Rptr. 30.

49. *Id.* at 892, 185 Cal. Rptr. at 30.

50. *Allied E. Fin. v. Goheen Enter.*, 265 Cal. App. 2d at 134, 71 Cal. Rptr. at 128.

51. See *Brandolino v. Lindsay*, 269 Cal. App. 2d 319, 75 Cal. Rptr. 56 (1969) (lis pendens does not operate to preclude money damages in event specific performance is not decreed).

tlement to those rights merely by filing a *lis pendens*⁵² which, when expunged, provided a security bond. The gravamen of this argument is that the property was not unique to plaintiff, nor perhaps even necessary for the resolution of the underlying claim; plaintiff was not claiming the title or possession of the property itself.

In cases prior to *Coppinger*, when courts granted expungement under section 409.2, a nexus existed between the underlying claim and the property in question.⁵³ In *Coppinger*, however, because plaintiff alleged a constructive trust she gained the advantage of being able to file a *lis pendens*. The *lis pendens* enabled plaintiff to secure either the property or, upon expungement, at least a monetary security.

Thus, plaintiff's remedy appears extraordinary where, in essence, defendants' property had no relation to the transaction that was the basis of plaintiff's suit.⁵⁴ Unlike the situation in *Coppinger*, when the property is unique to a plaintiff or is the subject of the underlying claim the plaintiff has a significant interest in protecting the particular property. If the property is transferred, *pendente lite*, the plaintiff could never be fully compensated.⁵⁵

Coppinger, however, allowed a *lis pendens* in what essentially was an ordinary fraud action. Plaintiff was not claiming the title to or possession of defendants' property, but rather was looking to the property to secure a possible money judgment. Read broadly, *Coppinger* opens the door for subtle and creative pleading in any fraud action. By alleging a constructive trust, or even an equitable lien, a plaintiff, who at most should be considered only a general creditor, effectively becomes a secured creditor with the availability of a *lis pendens*. Yet, in the normal attachment scheme, courts are divided on whether an attachment is proper in a fraud action.⁵⁶

52. See also Sclar, *From the Courts: New Jersey Lis Pendens Statute Constitutional*, 11 REAL EST. L.J., 158, 159 (1982) (discussing *Chrysler Corp. v. Fedders*, 519 F. Supp. 1252 (D.N.J. 1981), *vacated*, 670 F.2d 1316 (3rd Cir. 1982)).

53. See, e.g., *Trapasso v. Superior Court*, 73 Cal. App. 3d 561, 140 Cal. Rptr. 821 (1977) (action seeking specific performance to convey one-third interest in real property); *Empfield v. Superior Court*, 33 Cal. App. 3d 105, 108 Cal. Rptr. 375 (1973) (action to rescind contract and reacquire real property transferred as down payment).

54. The *lis pendens* assumes, in this situation, that property is the only asset available with which to satisfy a possible judgment.

55. Cf. CAL. CIV. CODE. § 3387 (Deering 1972).

56. See *Klein v. Benaron*, 247 Cal. App. 2d 607, 56 Cal. Rptr. 5 (1967) (attachment issued in cause of action for fraud where court found an implied promise to pay); *Hecht v. Smith*, 183 Cal. App. 2d 723, 7 Cal. Rptr. 209 (1960) (attachment issued in cause of action for fraud where defendant was alleged to be non-resident of state); *Yosemite v. Case-Swayne*, 73 Cal. App. 2d 806, 167 P.2d 541 (1946) (attachment issued in cause of action for direct

The *Brownlee* court, referring to the effect of an improperly filed lis pendens, stated that "any litigant [can] effectively tie up the title of another litigant in an ordinary action for money [damages] with complete immunity to the requirement for posting attachment bonds."⁵⁷ Thus, the lis pendens procedure, in the context of actions to impose constructive trusts or equitable liens, may give rights to a plaintiff with insufficient process.

IV. CONSTITUTIONAL IMPLICATIONS

A. *Constructive Trusts and Equitable Liens*

Special rules for land are based on the rationale that because land is unique, an owner has a special interest to protect. The remedy of constructive trust was created to prevent unjust enrichment where it was inequitable for a defendant to hold title to or an interest in certain property.⁵⁸ The only conditions necessary, in order to create a constructive trust, are "the existence of some interest in property, one's right to that interest, and another's gain of that interest by fraud, accident, mistake, undue influence, or the violation of a trust or other wrongful act."⁵⁹

Because a constructive trust is purely a remedial device, courts can administer it with considerable flexibility.⁶⁰ It is usually enforced whenever specific restitution in equity is appropriate.⁶¹ A constructive trust may be imposed only by court decree; it cannot be created through the parties' intentions.⁶²

Factual variations may permit the imposition of an equitable lien rather than a constructive trust.⁶³ The difference is that a con-

payment of money regardless of allegation of fraud); *Runkle v. Lane*, 40 Cal. App. 2d 654, 105 P.2d 373 (1940) (attachment stands in action for fraud on *implied promise to pay*); *Stone v. Superior Court*, 214 Cal. 272, 4 P.2d 777 (1931) (attachment will *not* lie in action for fraud where plaintiff sought *rescission* and right to *recovery of money or property*) (emphasis added).

57. *Brownlee v. Vang*, 206 Cal. App. 2d at 817, 24 Cal. Rptr. at 160.

58. D. DOBBS, *REMEDIES*, § 9.6 (1973).

59. *Kraus v. Willow Park Public Golf Course*, 73 Cal. App. 3d 354, 140 Cal. Rptr. 744 (1977); see also A.W. SCOTT, *LAW OF TRUSTS*, § 462 (3d ed. 1967); CAL. CIV. CODE § 2224 (Deering 1972) (involuntary trusts).

60. D. DOBBS, *supra* note 58, § 4.3. Moreover, at least in theory, a constructive trust or equitable lien is only imposed where plaintiff's funds are traced to other funds or property. *Id.* § 5.16.

61. *Id.* § 4.3. The remedy may be denied if it would work an unwarranted preference over creditors.

62. G. BOGERT, *LAW OF TRUSTS*, § 77 (5th ed. 1973). The decree is retroactive to the date when the unlawful holding began.

63. An equitable lien is essentially a limited form of a constructive trust and is used when a plaintiff is entitled to only part of the property to which the lien attaches. D. DOBBS,

structive trust gives complete title to a plaintiff and the equitable lien affords plaintiff only a security interest in the property which can later be used to satisfy a money judgment.⁶⁴

A constructive trust or an equitable lien, may be imposed in three factual situations: (1) for claims arising out of the subject property itself, and where, because the property is unique to plaintiff, money damages are not an adequate remedy;⁶⁵ (2) for claims arising between plaintiff and defendant out of a transaction concerning the subject property and, although money damages are an adequate remedy, plaintiff seeks to rescind the transaction and reacquire the property;⁶⁶ and (3) for claims arising out of facts not connected with the subject property, where money damages are an adequate remedy but plaintiff seeks a constructive trust or an equitable lien as security.⁶⁷

In each situation, the plaintiff is concerned with a different interest. In the third situation a plaintiff's position is analogous to a general creditor.⁶⁸ The property is not unique to plaintiff; the allegations of a constructive trust or an equitable lien act only as a collateral means to collect money damages. When these allegations are coupled with a *lis pendens*, a plaintiff gets the benefit of an interim remedy and gains priority in a defendant's property without having to show probable cause. It is this priority a plaintiff acquires in the property that "triggers" the due process clause.⁶⁹

B. Due Process

Due Process prohibits states from depriving an individual of property without notice and an opportunity to be heard.⁷⁰ In any due process analysis it must first be determined whether there is a significant deprivation of property, and second, whether that deprivation is accomplished through some state-provided mechanism.⁷¹

supra note 58, § 4.3.

64. The equitable lien may be "foreclosed" and sale proceeds applied to the payment of the claim. An equitable lien, like a constructive trust, may give the lienholder preference over other creditors. D. DOBBS, *supra* note 58, § 4.3; A.W. SCOTT, *supra* note 59, § 463; RESTATEMENT OF RESTITUTION, § 161 comment b (1937).

65. Sclar, *supra* note 52, at 162. This would usually be in the form of specific performance. See also, *supra* note 21.

66. Sclar, *supra* note 52, at 162. A constructive trust acts as a mechanism to restore the parties to their prior position. See also D. DOBBS, *supra* note 58, § 9.4.

67. Sclar, *supra* note 52, at 162.

68. *Id.*

69. See *Chrysler Corp. v. Fedders*, 519 F. Supp. at 1263.

70. U.S. CONST. amends. V and XIV, § 1; See also CAL. CONST., art. 1, §§ 7 and 15.

71. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948). For a discussion of property deprivation and state action in the *lis pendens* procedure, see Comment, *After Malcolm v. Superior*

A taking does not necessarily result in actual dispossession.⁷² Due process encompasses more than the "thing" which a person owns.⁷³ A lis pendens does not deprive a property owner of possession but interferes with the right to freely encumber or alienate the property.⁷⁴ Understandably, the economic implications from such interference can hardly be described as "de minimus."⁷⁵

The lis pendens is a creature of statute; it becomes effective only upon recordation by a county recorder and has no separate existence from the lawsuit to which it calls attention.⁷⁶ Thus, the statutory scheme providing for the imposition of a lis pendens probably satisfies the state action requirement.⁷⁷

The more important consideration in a due process analysis is whether the statutory procedure adequately identifies, weighs and accommodates the competing interests in the property.

One California court characterized the lis pendens procedure as being similar in purpose to an attachment of real property.⁷⁸ Therefore, to better understand whether the lis pendens procedure constitutionally protects the competing interests in the property, it is necessary to examine pre-judgment attachment procedures. Traditionally, pre-judgment attachment statutes that failed to provide adequate notice and hearing were held unconstitutional on the basis of overbreadth.⁷⁹ The statutes' common fatal flaw was that they were ap-

Court and Peery v. Superior Court: A Due Process Analysis of California Lis Pendens, 70 CALIF. L. REV. 909, 919-26 (1982).

72. *Shelley v. Kraemer*, 334 U.S. at 10; *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

73. *Shelley v. Kraemer*, 334 U.S. at 10.

74. *Empfield v. Superior Court*, 33 Cal. App. 3d at 108, 108 Cal. Rptr. at 377. *Empfield* rejected a constitutional challenge of the lis pendens statute on the grounds that a lis pendens did not deprive an owner of the use of property. The court conceded that the marketability of the property was impaired but upheld the impairment on the theory that the state must ensure that prospective buyers are provided with effective notice of litigation. The court assumes, however, that in all cases the property is unique or necessary to a resolution of the underlying claim. See also CEB, *supra* note 2, at 60-61 (property virtually unmarketable and uninsurable with lis pendens).

75. See *Connolly Dev. Co. v. Superior Court*, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976), *appeal dismissed*, 429 U.S. 1056 (1977). *Connolly* concerned the constitutionality of California's mechanic's lien statutes. The statutes were upheld in order to provide a remedy for a creditor whose work went into the subject property. The dissent, however, noted that a mechanic's lien "poses a threat pointed directly at the vitals of the debtor's economic independence," i.e., his home, his principal asset. *Id.* at 839, 553 P.2d at 661, 132 Cal. Rptr. at 501 (Richardson, J., dissenting). The effect of a lis pendens is no different.

76. *Garcia v. Pinhero*, 22 Cal. App. 2d 194, 197, 70 P.2d 675 (1937); *Albertson v. Raboff*, 46 Cal. 2d at 379, 295 P.2d at 408.

77. See *supra* note 75.

78. *Howden-Goetzl v. Superior Court*, 7 Cal. App. 3d at 138, 86 Cal. Rptr. at 326.

79. *E.g.*, *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969); Note,

plied in instances where no overriding state's or creditor's interests justified the summary procedure.⁸⁰

In comparing the *lis pendens* to pre-judgment attachment statutes, however, one commentator argued that the *lis pendens* does not suffer from the same deficiency because it concerns actions that affect only title to or possession of real property.⁸¹ This argument ignores the fact that a statute which operates narrowly is not necessarily free from defects inherent in its procedure.

*Sniadach v. Family Finance, Inc.*⁸² and its progeny⁸³ illustrate the constitutional limits on pre-judgment attachment schemes that fail to provide adequate notice and hearing. In *Sniadach*, the United States Supreme Court held that the interests of the debtor, creditor and state must be considered in evaluating the due process afforded in an attachment scheme.⁸⁴ California follows the United States Supreme Court's rationale. In *Randone v. Appellate Dept.*⁸⁵ the California Supreme Court recognized that summary procedures should be allowed only where exigent circumstances warrant the use of an interim remedy.⁸⁶ *Randone* expressed no judicial determination regarding real estate attachments. The court did, however, note a need in any *ex parte* proceeding to balance the respective interests.⁸⁷

In determining the constitutional adequacy of a statute, the par-

supra note 21, at 437.

80. Note, *supra* note 21, at 437.

81. *Id.* at 439. The United States Court of Appeal came to the same conclusion in *Chrysler Corp. v. Fedders*, 670 F.2d 1316, 1329 (3d Cir. 1982). Fedders challenged the constitutionality of New Jersey's *lis pendens* statute and contended that the failure to provide "an expeditious post-filing notice and hearing before a judicial officer" to establish, *inter alia*, whether the claim affects an interest in realty or merely constitutes a claim for money damages, offends due process. The court rejected Fedders's argument, reasoning that the limited application of the statute is protection enough against meritless claims. The court noted that a *lis pendens* was not a general creditor's remedy but failed to elaborate on that observation. *Id.* at 1329. The New Jersey *lis pendens* statute, however, explicitly provides that a *lis pendens* may be filed in an action seeking to impose an equitable lien.

82. 395 U.S. 337 (1969).

83. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

84. *Mitchell v. W.T. Grant Co.*, 416 U.S. at 607.

85. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

86. *Id.* at 557, 488 P.2d at 27, 96 Cal. Rptr. at 723. *Randone* concerned the attachment of a debtor's bank account. The court recognized that there was always a risk that a debtor could conceal or transfer any assets to avoid future execution. "We do not believe, however, that the mere potential mobility of an asset suffices, in itself, to justify depriving all owners of the use of such property on a general basis. Instead, in balancing the competing interests of all parties, we believe a more particularized showing of actual danger of absconding or concealing in the individual case must be required." *Id.* at 557 n.20, 488 P.2d at 27 n.20, 96 Cal. Rptr. at 723 n.20.

87. *Randone v. Appellate Dept.*, 5 Cal. 3d at 557, 488 P.2d at 27, 96 Cal. Rptr. at 723.

amount consideration must be to balance the opposing interests in view of the statutory purpose.⁸⁸ Similarly, in evaluating the due process afforded by the lis pendens procedure, the competing interests in the property must be balanced. The recording party's interest is in the resolution of the claim, particularly when the action seeks specific performance of a land sale contract. The unique quality of land to a particular plaintiff demands that his claim not be defeated by the transfer of the property, *pendente lite*. The defendant's interest, on the other hand, varies with his plans for the property.⁸⁹ If the owner has no plans for the property, then arguably, there is no deprivation.⁹⁰ If the lis pendens is challenged by the defendant, impliedly it is causing some deprivation. The state's interest is in ensuring an orderly recording system for the smooth and effective transfer of real property. In addition, the effect of the state's interest is not restricted to notifying third parties of pending litigation; it also ensures prompt satisfaction of judgments entered in the subject litigation.⁹¹

The lis pendens procedure does not distinguish between the classes of plaintiffs which affect the balancing of these interests. For example, when a lis pendens is filed it is assumed that the property is unique to a particular plaintiff or is necessary to achieve an effective resolution of the underlying claim. Because the plaintiff is not required to show any exigencies demanding the benefit of an interim remedy, the burden is left to the defendant to challenge the lis pendens.

If the defendant moves for expungement under section 409.1, the issue is whether the underlying cause of action affects the title to or possession of the subject property.⁹² If the property is truly unique to the plaintiff, expungement should be denied. On the other hand, if a plaintiff alleges a constructive trust or an equitable lien on property to secure only money damages, the action circumvents the true purpose of a lis pendens which is to give notice of pending litigation and not to give plaintiff added leverage in a lawsuit.⁹³

Upon close examination of the latter situation, however, the balance tips in favor of the plaintiff whose claim arose out of the

88. *Mitchell v. W.T. Grant Co.*, 416 U.S. at 607.

89. *See Chrysler Corp. v. Fedders*, 519 F. Supp. at 1262.

90. *Id.* A lis pendens does not affect use and enjoyment of property.

91. Note, *supra* note 21, at 440.

92. In addition, the recording party must evidence that the action was filed in good faith. *See supra*, note 30.

93. *Empfield v. Superior Court*, 33 Cal. App. 3d at 108, 108 Cal. Rptr. at 375.

subject property.⁹⁴ Although money damages may be an adequate remedy, there may also be some merit to the claim that the plaintiff is entitled to the property itself. The *lis pendens* functions as a means for the court to assert control over the subject matter of the litigation.⁹⁵ If the property has no relation to the underlying claim, but functions only as a security device, the balance weighs in favor of the defendant being afforded a hearing on the validity of the plaintiff's claim. Moreover, the state's interest is diminished because, absent some sort of judicial intervention, there is no longer a compelling need to preserve the particular property.

When the property is not related to the underlying claim, the plaintiff is similar to an attachment creditor for whom a pre- or post-filing hearing is constitutionally required.⁹⁶ The *lis pendens* procedure, however, assumes that the property will be transferred during litigation, or that the defendant will be unable to pay a potential money judgment.⁹⁷ Yet, the prospective inability to pay a possible money judgment is not grounds for an attachment on that fact alone.⁹⁸ The use of a *lis pendens* on property in which a plaintiff is seeking security for money only becomes an anomaly in view of the statutory purpose behind the *lis pendens*. In effect, the plaintiff is using the *lis pendens* to secure a private advantage. The result is that the defendant is denied due process guarantees.

California courts have recognized that a statutory procedure by which one litigant is forced to relinquish a property interest for the benefit of another effects a "taking" of property, entitling the former to prior procedural safeguards.⁹⁹ It has been suggested that section 409.2 was enacted to cover precisely those situations in which a plaintiff's interest in property is purely monetary.¹⁰⁰ When expunging a *lis pendens* under section 409.2, the issue is whether adequate relief can be accorded to the plaintiff if the motion is granted.¹⁰¹ If the *lis pendens* is expunged the defendant may be required to post a bond or suitable undertaking. Under this procedure, though, a defen-

94. *Id.* at 108, 108 Cal. Rptr. at 375. See *infra* notes 108-110 and accompanying text.

95. *Chrysler Corp. v. Fedders*, 670 F.2d at 1318.

96. *Sclar*, *supra* note 52, at 162.

97. It assumes that there are no other assets available for execution. Control of specific property may not be necessary for an effective resolution of the claim. See *generally* Comment, *supra* note 19, at 79.

98. CAL. CIV. PROC. CODE § 483.010 (Deering 1972 & Supp. 1983).

99. *Beaudreau v. Superior Court*, 14 Cal. 3d 448, 457, 535 P.2d 713, 718, 121 Cal. Rptr. 585, 590 (1975).

100. Comment, *supra* note 19, at 79.

101. See *supra* note 32.

dant is merely being given a choice of two deprivations.¹⁰² The requirement that the defendant post a bond or an undertaking has been held to be a "taking" demanding the protection of adequate procedural safeguards.¹⁰³

In *Beaudreau v. Superior Court*,¹⁰⁴ security for costs statutes were invalidated because they failed to provide a hearing to determine whether the statute's purpose was promoted by the imposition of an undertaking.¹⁰⁵ The court further noted that the statutes failed to provide guidelines for determining a "reasonable" undertaking.¹⁰⁶ Applying that rationale to the undertaking requirement in section 409.2, the correct inquiry should be whether the undertaking requirement furthers the statutory purpose.

The purpose of section 409.2 is to provide security to a plaintiff in the event the lis pendens is expunged and the property cannot be used to satisfy a possible judgment. The state's interest is in securing some sort of relief for the plaintiff.

In those situations where there is a nexus between the property and the underlying cause of action, there is justification for the imposition of an undertaking.¹⁰⁷ The court, in *Empfield v. Superior Court*,¹⁰⁸ articulated that an undertaking is appropriate when "it is beyond the court's power to return the real property to the [plaintiff] in its original state."¹⁰⁹ The property in *Empfield* had been materially changed by the construction of two houses on it. The court stated that it was therefore important that adequate relief be secured to the plaintiffs by the defendant's posting of a suitable

102. Comment, *supra* note 71, at 927.

103. *Brooks v. Small Claims Court*, 8 Cal. 3d 661, 667, 504 P.2d 1249, 1253, 105 Cal. Rptr. 785, 789 (1973) (reaffirming principle that even temporary measures may constitute a taking; neither eventual recovery of property nor posting of a bond remedy loss of use of property). *Accord*, *Beaudreau v. Superior Court*, 14 Cal. 3d at 455, 535 P.2d at 716-17, 121 Cal. Rptr. at 588-89.

104. 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). *Beaudreau* concerned an action brought by students and parents against a school district. Defendant school district demanded that plaintiffs post a \$25,700 undertaking as security for costs which might be awarded against plaintiffs, pursuant to Government Code sections 947 and 951. Failure to post the undertaking meant dismissal of the action. Plaintiffs attacked the constitutionality of the statutes.

105. *Id.* at 459, 535 P.2d at 720, 121 Cal. Rptr. at 592.

106. *Id.* at 460, 535 P.2d at 721, 121 Cal. Rptr. at 593.

107. The *Beaudreau* court noted that where both parties had "current, real interests in the property," the rules providing for a pre-judgment attachment hearing might be relaxed. *Id.* at 464, 535 P.2d at 724, 121 Cal. Rptr. at 596. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

108. 33 Cal. App. 3d 105, 108 Cal. Rptr. 375 (1973).

109. *Id.* at 108, 108 Cal. Rptr. at 377.

undertaking.¹¹⁰

Where the property is not unique to the plaintiff there is less justification for imposing the undertaking requirement without first affording the defendant a hearing.¹¹¹ The plaintiff is no different than a general creditor in this context. The state's interest is in securing some sort of relief for the prevailing party. But, in cases where there is no possibility of a judgment being rendered against a defendant, there is no justification for denying a defendant due process.¹¹²

V. ALTERNATIVES TO THE PRESENT LIS PENDENS PROCEDURE

Without a procedure to determine whether the plaintiff's claims are legitimately connected to the subject property, there is a substantial risk that a defendant in an ordinary fraud action could be unduly burdened by a lis pendens. Due process requires at least "judicial participation in the initial taking and an 'early hearing' at which time the party imposing the taking demonstrates probable cause to justify it."¹¹³ Thus, the use of a lis pendens in an action seeking to impose a constructive trust or an equitable lien on property requires that the relation of the property to the effective resolution of the underlying claim be determined. The lis pendens statute, however, provides no procedure to determine the competing interests in the property. Instead, it is assumed that in every case, either the state's or the creditor's interest compels the taking without first affording the defendant a hearing.

The defendant's interests would be accommodated if the lis pendens statute provided a procedure similar to the current attachment procedure.¹¹⁴ Thus, a lis pendens would be authorized only after a noticed hearing. Before a lis pendens can be filed on the

110. *Id.*

111. *See* *Beaudreau v. Superior Court*, 14 Cal. 3d at 459, 535 P.2d at 720, 121 Cal. Rptr. at 592. Moreover, a defendant may be required to bear the costs of the expungement process. CAL. CIV. PROC. CODE § 409.3 (Deering 1972 & Supp. 1983) (award of attorney fees to prevailing party); *Trapasso v. Superior Court*, 73 Cal. App. 3d at 569, 140 Cal. Rptr. at 825.

112. "We have repeatedly recognized that statutes providing a procedure according to which one litigant can be forced to relinquish an interest in his property for the benefit of another effectuate a 'taking' of property, entitling the former to prior procedural safeguards." *Beaudreau v. Superior Court*, 14 Cal. 3d at 457, 535 P.2d at 718, 121 Cal. Rptr. at 590. *See* *Brooks v. Small Claims Court*, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785.

113. *Beaudreau v. Superior Court*, 14 Cal. 3d at 465, 535 P.2d at 724, 121 Cal. Rptr. at 596 (quoting *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975)).

114. CAL. CIV. PROC. CODE § 484.040 (Deering 1972 & Supp. 1983) (no order or writ of attachment issued until after notice and hearing).

property, the party seeking to impose a constructive trust or an equitable lien on property should be required to file notice pending a hearing to show cause.¹¹⁵ At the hearing, which could be provided for automatically within fifteen days, the recording party would be required to show the probable validity¹¹⁶ of the claim. Furthermore, the court should consider additional oral or documentary evidence and additional points and authorities,¹¹⁷ as it does in attachment proceedings. This procedure would allow the court to make a determination of the uniqueness of the property to the plaintiff's claim, and would afford the defendant better protection against claims which may be for money damages only.¹¹⁸

Additionally, a procedure similar to the attachment procedure could provide for an ex parte issuance of a protective or restraining order if the plaintiff would be irreparably injured if the order were delayed until the matter could be heard on notice.¹¹⁹ The issuance of a temporary protective order upon the plaintiff's affirmative showing of need would avoid due process objections which exist under the current lis pendens statute when the property is restrained without a sufficient showing of state or creditor interest. In addition, a provision for an automatic hearing would probably not unduly burden the defendant.¹²⁰ Similarly, if the notice stays on record until the hearing, the state's interest is not affected.

If the court determines that the plaintiff has a compelling right to the property itself or to the property as security, the court could then demand the posting of an undertaking. In this regard, the defendant would be further protected because he would be afforded a hearing prior to posting a bond.

VI. CONCLUSION

In actions seeking to impose a constructive trust or an equitable lien for the recovery of money, there may be no competing interests in the property itself that would justify the summary treatment of

115. *Id.* § 484.050 (requires notice of application and a hearing on right to attach).

116. *Id.* § 481.190 provides in pertinent part: "[a] claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant."

117. *Id.* § 484.090(d) (upon a showing of good cause, the court may receive additional evidence or continue a hearing for production of additional evidence).

118. Because of the shortened time period, the state's interest might not be significantly impaired.

119. See CAL. CIV. PROC. CODE §§ 485.010(a), .101(b)(1), .101(b)(4) (Deering 1972 & Supp. 1983).

120. The defendant would no longer be burdened with challenging the lis pendens. Moreover, the plaintiff would still be required to show the probable validity of the claim.

the claim's merits as afforded by the *lis pendens* procedure. The use of a *lis pendens* under these facts becomes nothing more than a creditor's remedy of attachment.

Yet, in the context of creditor's remedies, California courts have characterized the necessary inquiry to be whether the statute affected a constitutional accommodation of the conflicting interests of the parties. Clearly, in an action for specific performance or rescission of a land sale contract, there may be compelling interests that justify the use of a provisional remedy to gain control of the property for an effective adjudication of the claim. But, as *Coppinger* illustrated, there may be no interest other than securing a claim for money damages. An action solely for money damages does not warrant the use of a *lis pendens* because it allows a plaintiff who is nothing more than a general creditor to gain priority in a defendant's property without a showing of probable cause.

To require a plaintiff who alleges a constructive trust or an equitable lien on property to follow a procedure similar to attachment would ensure the defendant more equitable treatment under the *lis pendens* statutes. The hearing requirement on the probable validity of the claim guarantees due process. Where the plaintiff is not seeking title to or possession of real property, a hearing protects a defendant from a deprivation of property for weak or meritless claims. In any litigation, fairness demands that the risks should be borne by those least likely to prevail.

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